FILE COPY

No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1938

EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, PETITIONER

v.

JOSEPH GEORGE STRECKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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In opposing certiorari herein the respondent has relied in part on the fact that the decree of the Circuit Court of Appeals is not final but directs that the case be remanded for trial *de novo* in the District Court. In view of this argument of respondent it seems appropriate to make clear our position that the character of the decree, so far from constituting a reason for denying the petition, furnishes additional ground for granting it.

The original decree of the Circuit Court of Appeals simply reversed the judgment of the District Court and remanded the cause to it (R. 110–113).

The Government's petition for rehearing was denied on June 7, 1938, but without the request of either party the judgment was amended to provide for a trial of the issues *de novo* in the District Court (R. 118). A second petition for rehearing was thereupon filed by the Government urging that a trial *de novo* in the District Court was an improper disposition of the case (R. 121–122). This petition was entertained by the court and denied on July 27, 1938 (R. 124). In the petition for certiorari the action of the Circuit Court of Appeals in ordering a trial *de novo* was specified as an error to be urged (Pet. 5).

In our view the direction for a new trial in the District Court, which is supported, as the court below observed, by *Ex parte Fierstein*, 41 F. (2d) 53 (C. C. A. 9th), is based upon a misapplication of the decisions of this Court holding that in deportation cases the issue of alienage or citizenship is one which may be tried *de novo* in the District Court on habeas corpus. See, e. g., *Ng Fung Ho* v. *White*, 259 U. S. 276. The peculiar character of the issue of alienage or citizenship, making such a course appropriate with respect to that issue, was pointed out by the Circuit Court of Appeals for the Sixth Circuit in *Exedahtelos* v. *Fluckey*, 54 F. (2d) 858. In that case the practice in the Ninth Circuit was expressly disapproved; the court reversed a decree of the District Court based upon a trial *de novo* where the evidence before the immi-

gration officers was insufficient to support the order. The court there pointed out that if the court concludes that the order is not supportable two courses are open, absent the issue of alienage or citizenship: an order of absolute discharge or an order of conditional discharge subject to further proceedings being taken by the immigration authorities within a designated time.

Where, as here, the procedural disposition of the case by the Circuit Court of Appeals raises in itself a serious question of practice, there is no reason to apply the general rule that interlocutory judgments will not be reviewed on certiorari. Cf. *Landis* v. *North American Company*, 299 U. S. 248, 254.

Since in our view the District Court cannot properly be required to try the disputed question *de novo*, and since such a requirement constitutes a departure from principles governing judicial review of administrative action, it is submitted that the present decree of the Circuit Court of Appeals affords a proper and indeed necessary occasion for the granting of certiorari.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

GERARD D. REILLY,
Solicitor, Department of Labor.

OCTOBER 1938.

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